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ABSTRACT

Recent case law within and outside the school context has revised or refined various concepts concerning eligibility and other K-12 issues under Section 504 and the Americans with Disabilities Act (ADA). Ten case lessons are described in this paper, seven of which are: (1) The frame of reference for determining "substantially limits" in the definition of disability is horizontal and national; (2) moreover, the determination of "substantially limits" is with, not without, mitigating measures; (3) providing a "504 Plan" for a student who may be eligible under the Individuals with Disabilities Education Act (IDEA) can lead to costly consequences; (4) conversely, providing a "504 Plan" as, in effect, a consolation prize for a student who is not eligible under the IDEA may also have costly consequences; (5) the majority standard for liability under Section 504 and the ADA appears to be bad faith or gross misjudgment; (6) with a limited exception, school officials in their individual capacity may not be liable under Section 504 or the ADA; and (7) the most recent cases may possibly signal a trend in favor of student-athletes in Section 504 or ADA cases against rules, without waivers, of interscholastic athletic associations. Rulings in other recent court decisions are given honorable mention at the end of the paper. (RT)

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§504/ADA Student Issues: The Latest and the Greatest.

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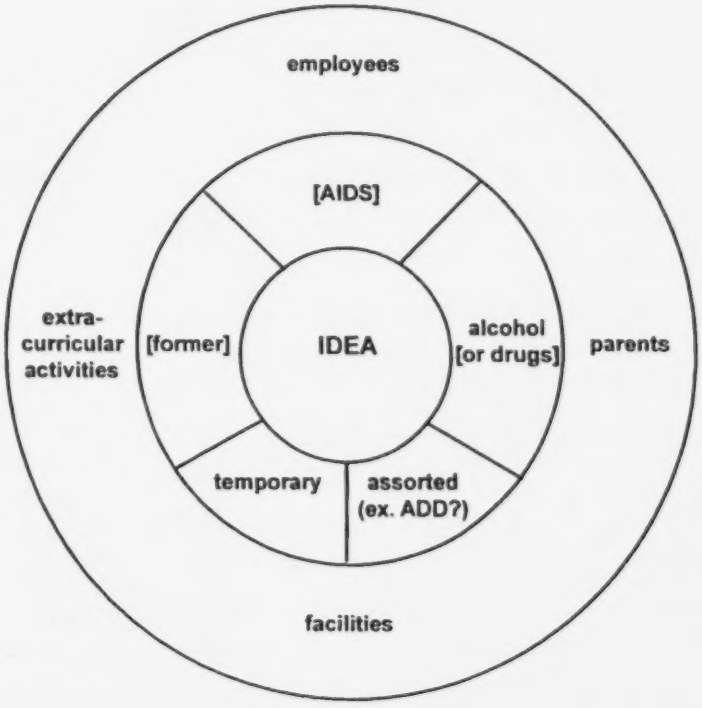

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The Latest and Greatest on 504/ADA[1]

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Recent case law within and outside the school context has revised or at least refined various concepts concerning eligibility and other k-12 student issues under Sec. 504 and the ADA.[2] A lá Letterman, here is my top-ten list of these concepts and their underlying court decisions. Just as long as they heed the warning against over-generalizing these results in terms of factual and jurisdictional boundaries, readers can benefit from these case-based lessons.

1. ***The frame of reference for determining "substantially limits" in the definition of disability is horizontal and national.***

   Contrasted with the primarily vertical frame of reference for the IDEA definition of "specific learning disability" (SLD), which is the individual's achievement in relation to his/her ability, the basis for calculation under Sec. 504 and the ADA is the average person, or most people, in the general population.[3] The supporting caselaw has arisen not only in the analogous areas of employment[4] and higher education,[5] but also the direct context of k-12 education.[6]

2. ***Moreover, the determination of "substantially limits" is with, not without, mitigating measures.***

   Resolving the split in lower court caselaw and minimizing the interpretation of the EEOC, the Supreme Court recently concluded, in a triad of private sector employment cases that appear to be directly applicable to the k-12 student context, that the determination of whether an individual has a disability should be made with reference to mitigating measures, such as eyeglasses and medication.[7]

3. ***Providing a "504 Plan" for a student who may be eligible under the IDEA can lead to costly consequences.***

   In one case, the Second Circuit granted tuition reimbursement to the parents of a student to whom the district offered a 504 Plan after concluding, wrongly, that she did not meet the IDEA definition of emotional disturbance.[8] In an earlier case, the Eighth Circuit granted transition services, attorneys fees and costs to an orthopedically impaired child whom the district had exited from special education upon the completion of her

physical education coursework but continued to provide with various instructional accommodations and related services.[9]

4. ***Conversely, providing a "504 Plan" as, in effect, a consolation prize for a student who is not eligible under the IDEA may also have costly consequences.***

In a New Jersey case, the federal district court upheld tuition reimbursement for the parents of an ADHD child to whom the district, after defensibly determining lack of eligibility under the IDEA, had provided a rather extensive 504 Plan.[10]

5. ***The majority standard for liability under Sec. 504 and the ADA appears to be bad faith or gross misjudgment.***

Several circuits have concluded that liability under Sec. 504 and the ADA requires proof at bad faith or gross misjudgment.[11] Some courts have interpreted this standard as applicable in Sec. 504 and ADA cases regardless of the relief sought.[12] The Supreme Court's recent ruling that rejected disparate impact analysis under Title VI,[13] which is an arguably analogous civil rights act, seems to support such a high standard for relief under Sec. 504 and the ADA. Moreover, where the standard is met, the Supreme Court even more recently clarified that only compensatory, not punitive, damages are available under Sec. 504 and the ADA.[14]

6. ***With a limited exception, school officials in their individual capacity may not be liable under Sec. 504 or the ADA.***

A federal district court recently held that school officials in their personal capacity are beyond the reach of Sec. 504 and the ADA for the respective reasons that they do not receive federal funds and are not public entities.[15] The limited exception is where the individual is in the position to accept federal funds.[16] Another possible exception is for retaliation cases.[17]

7. ***The most recent cases may possibly signal a trend in favor of student-athletes in Sec. 504 or ADA cases against rules, without waivers, of interscholastic athletic associations.***

Like the professional golfer Casey Martin,[18] high school interscholastic athletes with disabilities have prevailed against waiver-less, absolute eligibility rules in recent cases.[19] However, the decreasing split in the recent,[20] as compared to the earlier,[21] case law will not necessarily be resolved entirely in the students' favor, depending on whether modifying or waiving the disputed rule would constitute a fundamental alteration. The Supreme Court decision in the *Martin* case seems to suggest that the first question is whether the disputed rule concerns an essential (analogous to widening the hole in golf) or a peripheral (analogous to waiving the walking-only requirement) feature. Second, if a peripheral, rather than indispensable, feature, Sec. 504 and the ADA require

an individualized determination as to whether the modification or waiver is not only reasonable and necessary, but also preserving the valid purpose(s) of the rule.

8. ***The exhaustion doctrine applies to FAPE cases brought by "pure" Sec. 504 students.***

The courts have been expansive with regard to applying the exhaustion requirement in FAPE cases including those for students covered by Sec. 504/ADA but not the IDEA.[22] In contrast, the courts have largely found this doctrine inapplicable in facilities accessibility[23] and other non-FAPE cases regardless of whether the child is purely Sec. 504 or double-covered.[24]

9. ***Sec. 504 or ADA suits may have a long "shelf life," including a longer statute of limitations than that for IDEA suits.***

Depending on the state law used by analogy, the statute of limitations for Sec. 504 or ADA cases may be two to six years, which is often longer than that for IDEA cases.[25] Moreover, in some jurisdictions, the period does not toll until the child reaches the age of majority.[26] Thus, the "shelf life" for Sec. 504 and ADA cases may be long.

10. ***States may be immune to liability for money damages under the ADA and, less likely, under Sec. 504.***

The Supreme Court, in a 5-to-4 decision, recently ruled that Congress' attempted abrogation of the states' Eleventh Amendment immunity was ineffective for Title I of the ADA, which is specific to employment.[27] Although there is some support for extending the Supreme Court's ADA Title I analysis to ADA Title II,[28] which applies to governmental entities, this issue is not clearly settled. The possibility of Eleventh Amendment immunity in relation to Sec. 504 is slimmer. In a controversial and complicated decision, a three-judge panel of the Eighth Circuit held that Sec. 504 did not validly abrogate the state education department's Eleventh Amendment immunity and that the purported waiver, upon receiving federal funds, was "impermissible coercion"[29]; however, upon review *en banc* the entire membership of the Eighth Circuit reversed this waiver analysis.[30] Inasmuch as school districts are considered part of the state for Eleventh Amendment purposes in only a few states, such as California and Maryland, the school-related effect of these rulings is largely limited to state departments of education.[31]

The rulings in other recent decisions merit at least *Honorable Mention.*

- the Supreme Court recently issued an ADA ruling beyond the k-12 context that served as a reminder of the LRE, or integration, standard in relation to segregated settings[32]
- a recent court decision interpreted the ADA as having a lower causation standard than Sec. 504[33]
- another recent case serves as a reminder of the limited exemption under Sec. 504 and the ADA for discipline of students who are nonfunctional alcoholics[34]
- the Supreme Court recently rejected the catalyst theory in ADA (any, by implication, in Sec. 504) cases[35]
- a federal trial court recently incorporated the IDEA meaningful benefit standard with the Sec. 504 reasonable accommodation standard[36]

End Notes

[1] This paper is an updated version of an earlier article. Perry Zirkel, Section 504 and the ADA: The Top Ten Recent Concepts/Cases, 147 Ed.Law Rep. [761] (2000).

[2] For an earlier sampling of case law, see Perry Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 Ed.Law Rep. [601] (1993). For an analysis of the corresponding OCR rulings, see Perry Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 Ed.Law Rep. [369] (1997). For a comprehensive treatment that is currently being updated, see PERRY ZIRKEL AND STEVEN ALEMAN, SECTION 504, THE ADA, AND THE SCHOOLS (2000 + 2001 Supp.)(LRP Publications).

[3] Also in contrast to SLD under the IDEA, the frame of reference is learning, not particular functions or subjects. *See, e.g.*, Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234 (D. Mass. 1999); *cf.* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002)(manual tasks must be central to most people's daily lives); Land v. Baptist Med. Ctr., 164 F.3d 423 (8th Cir. 1999)(eating generically, not eating a specific food). *But cf.* Weixel v. Board of Educ., 287 F.3d 138 (2d Cir. 2002)(attending school as a major life activity?); Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69 (2d Cir. 2000)(reading); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997)(behavioral control).

[4] *See, e.g.*, McCleary v. National Cold Storage, Inc., 67 F. Supp. 2d 1288 (D. Kan. 1999); Brooks v. Harvest States Coop., 10 NDLR ¶ 62 (E.D. La. 1997); *see also* 29 C.F.R. § 1630.2(j)(1)(I)(EEOC's ADA Title I regulation)("significantly restricts the individual's ability to perform a major life activity as compared to the ability of the "average person in the general population … [to] perform that same … activity"); *cf.* 28 C.F.R. §1630.3(j)(3)(I)(ADA Title I regulation specifically for the major life activity of "working"); *cf.* 28 C.F.R. §§ 35.104 App. A, at 470, App. B., at 611 ("in comparison to most people") (DOJ's ADA Titles II and III interpretative guidance). *But cf.* Kohn v. AT&T Corp, 58 F. Supp. 2d 393 (D.N.J. 1999)(average person with comparable training, skills and abilities); *see also* 29 C.F.R. § 1630.3(j)(3)(i)(EEOC's ADA Title I regulations specifically for the major life activity of "working").

[5] *See, e.g.*, Betts v. Rector and Visitors of the Univ. of Virginia, 113 F. Supp. 2d 970 (W.D. Va. 2000); Gonzalez v. National Bd. of Med. Exam'rs, 60 F. Supp. 2d 703 (E.D. Mich. 1999); Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W.Va. 1997)("most people"); *cf.* Bartlett v. New York State Bd. of Law Exam'rs, 226 F.3d 69 (2d Cir. 2000)(professional licensing).

[6] *See, e.g.*, Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998)(private school); Ballard v. Kinkaid Sch., 147 F. Supp. 2d 603 (S.D. Tex. 2001)(private school – passing grades); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997); *cf.* Benik v. Lisle Community Sch. Dist., 30 IDELR 663 (N.D. Ill. 1999)(court used high test scores and GPA to conclude that the student received an appropriate education). However, at least according to a recent professional licensing decision, overreliance on standardized test score results, particularly based on a specific cut-off point, is suspect. *See* Bartlett v. New York State Bd. of Law Exam'rs, 21 NDLR ¶ 160 (S.D.N.Y. Cir. 2001).

[7] Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999). Mitigating measures do not necessarily include an individual's compensatory strategies. *See, e.g.,* Bartlett v. New York State Bd. of Law Exam'rs, 21 NDLR ¶ 160 (S.D.N.Y. Cir. 2001); Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032 (D. Ariz. 1999), *cf.* Root v. Georgia State Bd. of Veterinary Med., 114 F. Supp. 2d 1324 (N.D. Ga. 2000). For refusal or failure to follow the prescribed regimen of the mitigating measure, such as medication, see, e.g., Hein v. All American Plywood Co., 232 F.3d 482 (6th Cir. 2000); Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926 (N.D. Ill. 2002); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587 (D. Md. 2000); *see also* Capizzi v. County of Placer, 135 F. Supp. 2d 1105 (E.D. Cal. 2001)(mitigation required as a matter of "reasonable diligence"); Nawrot v. CPC Int'l, 18 NDLR ¶ 167 (N.D. Ill. 2000)("distorted result … [where] the judge pretends that the plaintiff is always clothed with those measures"). Another recent private sector employment case demonstrates that the presence of a mitigating measure does not necessarily mean that the individual will fail to qualify as having a disability. *See* Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000)(despite medication and surgery, employee's epilepsy substantially limited her walking, seeing, and speaking). For pertinent education employment cases, see, e.g., Taylor v. Phoenixville Sch. Dist., 113 F. Supp. 2d 770 (E.D. Pa. 2000)(factual issue whether school secretary with bipolar disorder was substantially limited with medication); Schumacher v. Souderton Area Sch. Dist., 163 LRRM 2461 (E.D. Pa. 2000)(jury question whether teacher's ADHD, controlled by medication, is substantial limitation); Brown v. Holy Name Church, 80 F. Supp. 2d 1261 (D. Wyo. 2000)(teacher was not substantially limited after hip-replacement surgery). For relevant higher education cases, see, e.g., Garcia v. State Univ. of New York Health Sci. Ctr., 19 IDELR ¶ 57 (E.D.N.Y. 2000)(factual question requiring individualized determination), *aff'd on other grounds*, 280 F.3d 98 (2d Cir. 2001). For a k-12 student case, see, e.g., Ballard v. Kinkaid Sch., 147 F. Supp. 2d 603 (S.D. Tex. 2001)(Irlen lenses).

[8] Muller v. Committee on Special Educ., 145 F.3d 95 (2d Cir. 1998). As a related matter, the Office for Civil Rights has opined that a child who is covered by IDEA as well as Section 504 is not entitled to a 504 plan where the district has offered an IEP. See Response to McKethan, 25 IDELR 295 (OCR 1996). Finally, an IEP may well suffice for the entitlement under Section 504 for districts that, for whatever reason, choose that route. *See, e.g.*, J.D. v. Pawlett Sch. Dist., 224 F.3d 60 (2d Cir. 2000).

[9] Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996).

[10] Borough of Palmyra Bd. of Educ. v. F.C., 2 F. Supp. 2d 637 (D.N.J. 1998). *But cf.* J.D. v. Pawlett Sch. Dist., 224 F.3d 60 (2d Cir. 2000)(IEP was reasonable accommodation); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2002)(proposed 504 plan was reasonable accommodation); Grant v. St. James Parish Sch. Bd., 33 IDELR ¶ 212 (E.D. La. 2000)(proposed 504 plan); Benik v. Lisle Community Unit Sch. Dist. No. 202, 30 IDELR 663 (N.D. Ill. 1999)(504 plan was sufficient). For a summary of the more complete story in *Palmyra*, see Perry Zirkel, *A Two-Headed Monster*, 81 PHI DELTA KAPPAN 410 (1998). The related problem is whether the "child find" obligation under Sec. 504 is robust. *Compare* W.B. v. Matula, 67 F.2d 484 (3d Cir. 1995), *with* T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997).

[11] *See, e.g.*, Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 (8th Cir. 1999); Sellers v. School Bd., 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1999); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147

(N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 (2d Cir. 1999); M.P. v. Independent Sch. Dist. No. 721 (200 F. Supp. 2d 1036 (D. Minn. 2002); Butler v. South Glens Falls Cent. Sch. Dist., 106 F. Supp. 2d 420 (N.D.N.Y. 2000). *But see* Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); O.F. v. Chester Upland Sch. Dist., 32 IDELR ¶ 114 (E.D. Pa. 2000); J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); *cf.* Smith v Maine Sch. Administrative Dist. No. 6, 34 IDELR ¶ 201 (D. Me. 2001)(deliberate indifference).

[12] *See, e.g.*, Timothy H. v. Cedar Rapids Community Sch. Dist., 178 F.3d 968 (8th Cir. 1999); Keith v. Allen, 28 IDELR 1203 (8th Cir. 1998); K.U. v. Alvin Indep. Sch. Dist., 491 F. Supp. 599 (S.D. Tex.), *aff'd mem.*, 166 F.3d 341 (5th Cir. 1998); Prins v. Independent Sch. Dist. No. 761, 27 IDELR 312 (D. Minn. 1997); A.W. v. Marlborough Co., 25 F. Supp. 2d 27 (D. Conn. 1998).

[13] Alexander v. Sandoval, 532 U.S. 275 (2001).

[14] Barnes v. Gorman, 122 S. Ct. 2097 (2002).

[15] Magagna v. Salisbury Township Sch. Dist., 29 IDELR 725 (E.D. Pa. 1998); *see also* Smith v. Maine Sch. Administrative Dist. No. 6, 34 IDELR ¶ 5 (D. Me. 2001); Berthot v. Stadler, 19 NDLR ¶ 164 (E.D. La. 2000); Lemire v. Silva, 104 F. Supp. 2d 80 (D Mass. 2000); Scott C. v. Bethlehem Area Sch. Dist., 33 IDELR ¶ 93 (E.D. Pa. 2000); J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); Schumacher v. Souderton Area Sch. Dist., 163 LRRM 2461 (E.D. Pa. 2000). *But cf.* W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995)(qualified immunity).

[16] *See, e.g.*, Lee v. Trustees of Dartmouth College, 958 F. Supp. 37 (D.N.H. 1997); Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997).

[17] *Compare* Gupta v. Montgomery County Pub. Sch., 25 IDELR 115 (D. Md. 1996) *with* Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Boe v Allied Signal, 20 NDLR ¶ 111 (D. Kan. 2001). In comparison, supervisors are not liable via the doctrine of respondeat superior under § 504 or the ADA. *Gupta*, 25 IDELR at 117.

[18] PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

[19] *See, e.g.*, Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir.), *cert. denied*, 528 U.S. 1046 (1999); Kling v. Mentor Pub. Sch. Dist., 34 IDELR ¶ 148 (N.D. Ohio 2001); Bingham v. Oregon Interscholastic Activities Ass'n, 37 F. Supp. 2d 1189 (D. Or. 1999). As a direct result of the *Martin* decision, a federal court recently required the athletic association to develop and implement a waiver-hearing procedure to determine whether the requested modification was necessary, reasonable, and not a fundamental alteration of the competition. Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 (E.D. Pa. 2001).

[20] For recent decisions adverse to the plaintiff-student, see Paul v. Henrico County Pub. Sch., 32 IDELR ¶ 173 (E.D. Va. 2000)(enrollment requirement); Eagle Union Community Sch. Dist., 28 IDELR 1138 (Ind. SEA 1998), *aff'd on other grounds sub nom.* P.J. v. Eagle Union Community Sch. Dist., 31 IDELR ¶ 108 (7th Cir. 2000)(athletic team membership). Recent court decisions also represent mixed results on the direct threat, or risk of injury, defense based at least in part on the specific facts. *Compare* Inskip v. Astoria Sch. Dist., 30 IDELR 398 (D. Or. 1999), *with* Doe v. Woodford, 213 F.3d 921 (6th Cir. 2000). For a related illustration, a federal court recently refused a preliminary injunction sought by a student with a disability whom the administration suspended from the lacrosse and football team for violating the school's code of conduct. Long v. Board of Educ., 167 F. Supp. 2d 988 (N.D. Ill. 2001).

[21] *Compare, e.g.*, Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Athletic Ass'n, 40 F.3d 926 (8th Cir. 1994); Beatty v. Pennsylvania Interscholastic Athletic Ass'n, 24 IDELR 1146 (M.D. Pa. 1996); Reaves v. Mills, 904 F. Supp. 120 (W.D.N.Y. 1995); M.H. v. Montana High Sch. Ass'n, 25 IDELR 42 (D. Mont. 1995), *with* Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Johnson v. Florida High Sch. Athletic Ass'n, 899 F. Supp. 579 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1996); University Interscholastic Athletic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993). For a comprehensive overview, see Kathleen Sullivan, Patricia Lantz & Perry Zirkel, *Leveling the Playing Field or Leveling the Players?* 33 J. SPECIAL EDUC. 258 (2000).

[22] *See, e.g.*, Cudjoe v. Independent Sch. Dist. No. 12, 37 IDELR ¶ 91 (10th Cir. 2002); Babicz v. School Bd., 135 F.3d 1420 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 53 (1999); Eads v. Unified Sch. Dist. No. 289, 184 F. Supp.2d 1122 (D. Kan. 2002); DeVaux v. Vallas, 35 IDELR ¶ 5 (N.D. Ill. 2001); Benik v. Lisle Community Unit Sch. Corp., 30 IDELR 124 (N.D. Ill. 1999); Thomas v. East Baton Rouge Sch. Bd., 29 F. Supp. 2d 337 (M.D. La. 1998); *cf.* Rose v. Yeaw, 214 F.3d 306(1st Cir. 2000)(mixed issues); Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000)(retaliation). *But see* J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); *cf.* O'Hayre v Board of Educ., 33 IDELR ¶ 94 (D. Colo. 2000)(harassment and discriminatory discipline). As a partially related matter, some courts have even required exhaustion where the plaintiff was seeking money damages under § 504 or the ADA in a jurisdiction where it is unavailable under the IDEA. *See, e.g.*, Charlie F. v. Board of Educ., 98 F.3d 989 (7th Cir. 1996); W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317 (M.D. Ala. 1997); Koopman v. Fremont County Sch. Dist. No. 1, 911 P.2d 1049 (Wyo. 1996); *cf.* Praino v. Board of Educ., 25 IDELR 972 (2d Cir.), *cert. denied*, 522 U.S. 888 (1997); Pullen v. Botetourt County Sch. Bd., 23 IDELR 607 (W.D. Va. 1997); Prins v. Independent Sch. Dist. No. 761, 23 IDELR 544 (D Minn. 1995)(beyond hearing officer's authority). *But see* Glass v Hillsboro Sch. Dist. 1J, 33 IDELR ¶ 244 (D. Or. 2000); McKay v. Winthrop Bd. of Educ., 26 IDELR 1100 (D. Me. 1997); Jeffery Y. v. St. Mary's Area Sch. Dist., 967 F. Supp. 852 (W.D. Pa. 1997).

[23] *See, e.g.*, Bechtel v. East Penn Sch. Dist., 20 IDELR 892 (E.D. Pa. 1994)(accessibility). The determination may depend on whether the case issue is characterized as FAPE or not. *Compare* Gaudiello v. Delaware County Intermediate Unit, 796 F. Supp. 849 (E.D. Pa. 1992)(service animal as subsidiary to FAPE/LRE) *with* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990)(service animal in terms of accessibility).

[24] *See, e.g.*, Moubry v. Independent Sch. Dist. No. 696, 951 F. Supp. 867 (D. Minn. 1996). *But cf.* Kielbus v. New York City Bd. of Educ., 140 F. Supp. 2d 248 (E.D.N.Y. 2001)(participation in non-IDEA programs).

[25] *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.2d 272 (3d Cir. 1996); Smith v. Special Sch. Dist. No. 1, 24 IDELR 1003 (D. Minn. 1996), *aff'd on other grounds*, 184 F.3d 764 (8th Cir. 1999); Andalusia City Bd. of Educ., 916 F. Supp. 1179 (N.D. Ala. 1996). However, in some states, this plaintiff advantage is not the case. *See, e.g.*, Bernard v. School Bd., 58 F. Supp. 2d 669 (E.D. Va. 1999); James v. Upper Arlington City Sch. Dist., 987 F. Supp. 1017 (S.D. Ohio 1997).

[26] *See, e.g.*, Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992); McKellar v. Commonwealth, 29 IDELR 1064 (E.D. Pa. 1999); Smith v. Special Sch. Dist. No. 1, 24 IDELR 1003 (D. Minn. 1996), *aff'd on other grounds*, 184 F.3d 764 (8th Cir. 1999). Whether tolling applies may depend on the nature of the relief sought. *See, e.g.*, Wadsworth City Sch., 31 IDELR ¶ 224 (Ohio SEA 1999).

[27] Garrett v. University of Alabama at Birmingham, 531 U.S. 356 (2000).

[28] Reickenbacker v. Foster, 22 NDLR ¶ 85 (5th Cir. 2001); Thompson v. State of Colorado, 258 F.3d 1241 (10th Cir. 2001); Doe v. Barger, 193 F. Supp. 2d 1112 (E.D. Ark. 2002); Biggs v. Board of Educ., 36 IDELR ¶ 124 (D Md. 2002); Lieberman v. State of Delaware, 21 NDLR ¶ 220 (D. Del. 2001); *cf.* Garcia v. SUNY Health Sci. Ctr., 280 F.3d 98 (2d Cir. 2001)(standard of discriminatory animus or ill will).

[29] Bradley v. Arkansas Dep't of Educ., 189 F.3d 745 (8th Cir. 1999), *rehearing en banc granted on this issue only*, 197 F.3d 958 (8th Cir. 1999). Earlier, the Eighth Circuit reached the same result the same result, with the waiver analysis being irrelevant, for the ADA. Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct.1265 (2000); *cf.* Erickson v. Board of Governors for Northeastern Illinois Univ., 17 NDLR ¶ 168 (7th Cir. 2000).

[30] Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2001), *cert. denied*, 121 S. Ct. 2591 (2001) (ruled that by accepting federal funding, state state's education department waived its Eleventh Amendment immunity); *see also* Robinson v. Kansas, 295 F.3d 61 (10th Cir. 2002); A.W. v. Jersey City Pub. Sch., 37 IDELR ¶ 8 (D.N.J. 2002); Patrick W. v Lemahieu, 165 F. Supp. 2d 1144 (D. Hawaii 2001). Earlier cases rather summarily rejected such immunity. *See, e.g.*, Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997); *cf.* J.B. v. Valdez, 130 F.3d 1280 (10th Cir. 1999). For a more recent case that ruled in favor of immunity to Section 504, merely as summary consequence to the court's ADA Title II analysis, see Biggs v. Board of Educ., 36 IDELR ¶ 124 (D. Md. 2002).

[31] Of course, it directly affects state education institutions. *See, e.g.*, Doe v. Barger, 193 F. Supp. 2d 1112 (E.D. Ark. 2002)(state school for the deaf).

[32] Olmstead v. L.C., 527 U.S. 581 (1999)(held that the ADA required states to place an adult with a mental disability in a community, rather than institutionalized, setting if a such a placement is appropriate, is not opposed by the adult with a disability, and can be reasonably and equitably accommodated in light of the needs of "a large and diverse population of persons with mental disabilities"). *But cf.* St. Johnsbury Acad. v. D.H., 34 IDELR ¶ 32 (2d Cir. 2001)("qualified" is lower requirement in private than in public elementary/secondary schools).

[33] Baird v. Rose, 192 F.3d 462 (4th Cir. 1999). The causation element has been decisive in some Sec. 504 cases. *See, e.g.*, Doe v. Eagle Union Community Sch. Corp., 101 F. Suppp.2d 707 (S.D. Ind. 2000).

[34] Stearns v. Board of Educ., 31 IDELR ¶ 134 (N.D. Ill. 1999).

[35] Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001).

[36] Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 322 (E.D. Pa. 2002).

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